

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers;)	CC Docket No. 01-338
)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996;)	CC Docket No. 96-98
)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability)	CC Docket No. 98-147

REPLY COMMENTS OF CENTURYTEL, INC.

CenturyTel, Inc. (“CenturyTel”), through its attorneys, hereby offers this Reply to the comments filed on the above-captioned Further Notice of Proposed Rulemaking.¹ Despite the fears of competitive local exchange carriers (CLECs), the Communications Act of 1934 as amended (the “Act”)² and the Commission’s rules contain sufficient safeguards against unreasonable discrimination, and the goals of Section 252(i) of the Act can be achieved through generally available terms and conditions and the ability to opt into approved negotiated contracts.

DISCUSSION

A. The NYDPS and PUCO support elimination of the current pick and choose rule.

Both the New York Department of Public Service (NYDPS) and the Public Utilities Commission of Ohio (PUCO) join CenturyTel and other carriers in supporting the

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98), and Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147), Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-336 (rel. Aug. 21, 2003) (“Further Notice”).*

² 47 U.S.C. § 151 *et seq.*

proposed changes to the current pick and choose rule as more consistent with the goals of Section 251 to foster development of a competitive market. They agree that the best policy is to allow CLECs to elect SGAT-equivalent terms, negotiate a new agreement, or adopt another approved interconnection agreement in its entirety. The NYDPS maintains that this change in the rule will expand the options of services available to CLECs because ILECs will be incented to negotiate agreements that meet the unique needs of CLECs.³ PUCO points out that the current rule places parties that enter into the first interconnection agreement at a competitive disadvantage vis-à-vis subsequent carriers that opt into that agreement, because subsequent carriers can take advantage of ILEC concessions without making any corresponding trade-offs.⁴ The Ohio regulator also notes that the current pick and choose rule will become unmanageable as ILECs begin to gain relief, market by market, from unbundling requirements.⁵ The comments of both the NYDPS and PUCO stem from experience overseeing intense competition and arbitrating numerous complex Section 251 interconnection agreements and disputes between competitors. The Commission should afford them significant weight.

B. Existing non-discrimination requirements will ensure against the enforcement of “poison pills” and other imagined evils posited by the CLECs.

CLECs grossly overstate an ILEC’s ability to insert in an interconnection agreement onerous terms solely to discourage other carriers from opting into that agreement. Non-discrimination requirements abound in Section 251 of the Act, including in Sections 251(b)(1), (b)(3), (b)(4) (incorporating Section 224 by reference), (c)(2)(D), (c)(3), (c)(4) and

³ Comments of the State of New York Department of Public Service filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 2.

⁴ Comments of the Public Utilities Commission of Ohio filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 3.

⁵ *Id.*

(c)(6). None of the commenters have explained why those provisions are inadequate to prevent unreasonably discriminatory behavior.

MCI, for example, claims (without support) that the proposed rule change will make it difficult for CLECs to demonstrate that an agreement is unlawfully discriminatory because they will have to prove discriminatory “intent.”⁶ The Commission has a long history of finding unreasonable discrimination in tariffed offerings by dominant carriers.⁷ Discriminatory intent, however, has not been an issue in any of those cases. The Commission simply analyzes whether an economically rational basis for the discrimination, other than an anti-competitive one, exists. This test remains a valid standard for evaluating whether a carrier is making service offerings generally available to similarly situated customers, and it is legally sufficient to prevent unreasonable “poison pills” from being enforced.

To the extent that a CLEC is denied the benefit of, say, a volume or term discount because it does not have the volume or does not want to commit for the term of the agreement, it is appropriate that such a carrier should not be permitted to opt into any part of that agreement. Each carrier should be required to agree to *all* aspects of an agreement, or negotiate its own

⁶ Comments of Worldcom, Inc. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 14.

⁷ *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990); *In the Matter of Southwestern Bell Telephone Company, Tariff FCC No. 73*, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311 (1997). Under Commission precedent, a dominant carrier may offer what would otherwise be considered a discriminatory tariff under Section 202(a) of the Act by demonstrating that: (1) the customers of the discounted offering have a competitive alternative from which to choose; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users. *Private Line Rate Structure and Volume Discount Practices Guidelines*, CC Docket No. 79-246, Report and Order, 97 FCC 2d 923, 948 (1984).

agreement.⁸ This result is consistent with Commission precedent requiring that carriers make the same terms available only to *similarly situated* customers.⁹

CLECs, including MPower, Worldcom, and American Farm Bureau, inaccurately claim that they will be forced at great expense to arbitrate every issue with the ILEC under the Commission's proposed rule change.¹⁰ These CLECs over-dramatize the situation by ignoring that they still may to "opt into" any existing, approved Section 251 agreement on file with the state commission, or to take the standard terms and conditions from the SGAT. The alternative is to deny carriers that are willing to make certain commitments and trade-offs the economic benefit of that bargain. While such a result may be an advantage to some CLECs, it is a net disadvantage to competition and customers, and the Commission should discourage it.

The CLECs also rattle off other unsubstantiated claims regarding SGATs, including claims that ILECs are unlikely to honor all of the SGAT terms,¹¹ and that SGATs are inadequate because they are outdated and require significant revisions to conform with current law.¹² These claims are red herrings. If an ILEC does not honor the terms of its SGAT, a

⁸ As PUCO and NYDPS point out, each agreement represents trade-offs by *both* parties.

⁹ *See supra* Section B.

¹⁰ Comments of Mpower Communications Corp. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 8-9; Comments of Worldcom, Inc. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 17-20; Joint Comments of the American Farm Bureau, Inc., Anew Telecommunications Corporation d/b/a Call America, Creative Interconnect, Inc., Enhanced Communications Network, Inc., the Utilities Commission of New Smyrna Beach, and A+ American Discount Telecom, LLC filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 10.

¹¹ Comments of Mpower Communications Corp. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 8-9.

¹² Comments of Worldcom, Inc. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 17-20. Although Worldcom submits a declaration by one of its employees listing a number of SGATs that are allegedly out of date, the Worldcom

complaint may be filed; if an SGAT is not compliant with current law, state commissions have the authority to require that ILECs revise them within a specified timeframe. There simply is no evidence on the record that independent LECs, such as CenturyTel, have abused the negotiation process or are unreasonably refusing to negotiate or to interconnect as required by the Act.¹³

C. Section 252(i) is susceptible to multiple reasonable interpretations.

The Commission should disregard MCI's baseless declaration that the intent of Section 252(i) is unambiguous.¹⁴ To the contrary, there is no indication that Congress intended the Commission's prior interpretation to be the only reading of the statute. In fact, the Supreme Court confirmed that the statute is susceptible to more than one meaning.¹⁵ Although MCI is correct that the Supreme Court found the Commission's prior interpretation of Section 252(i) to be the "most readily apparent" reading of the statute,¹⁶ the Court did not state that that interpretation is the *only* reasonable reading of Section 252(i). Furthermore, in spite of MCI's claim to the contrary, the Commission need not be held to prior interpretations of Section 252(i).

employee does not state on what basis he believes the terms to be out of date, other than the number of years they have been on file. Comments of Worldcom, Inc. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003, Attachment 1 at 3-7.

¹³ All of the comments in which CLECs complain of anti-competitive behavior involve conduct by the Bell Operating Companies (BOCs). *See* Comments of Worldcom, Inc. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 10-11; Comments of Mpower Communications Corp. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 10; Comments of US LEC Corp., TDS Metrocom, LLC, Focal Communications Corp., Pac-West Telecomm, Inc., Globalcom, Inc., Lightship Telecom LLC, and One-eighty Communications, Inc. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 5-6. Independent LECs should not be tarred with that brush.

¹⁴ Comments of Worldcom, Inc. filed in CC Dockets No. 01-338, 96-98, and 98-147 on Oct. 16, 2003 at 4-8.

¹⁵ *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999) (noting that it seems "eminently fair" to conclude that "[a] carrier who wants one term from an existing agreement . . . should be required to accept *all* the terms in the agreement")

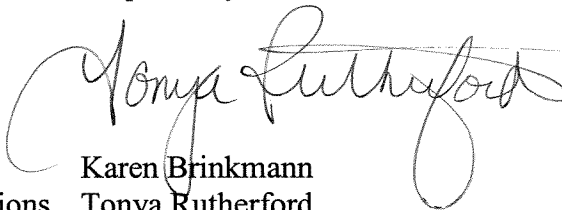
¹⁶ *Id.*

Federal case law makes clear that the Commission may lawfully replace an existing reasonable interpretation of a statutory provision with another reasonable interpretation.¹⁷

CONCLUSION

For the reasons stated herein, CenturyTel supports eliminating the current pick and choose rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karen Brinkmann", is written over the typed name and address of Karen Brinkmann.

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¹⁷ *Clinchfield Coal Company v. Federal Mine Safety and Health Review Comm'n*, 895 F.2d 773 (D.C. Cir. 1990).